2007

Utah v. Draper : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Appeal No. 20070159
RYAN DRAPER,	:	
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

THIS IS A DIRECT APPEAL FROM A JUDGMENT AND COMMITMENT ENTERED IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE SHEILA McCLEEVE, JUDGE, PRESIDING.

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ORAL ARGUMENT/PUBLISHED OPINION REQUESTED

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REPLY BRIEF OF APPELLANT

I. DRAPER HAS DEMONSTRATED THE OUTCOME OF HIS CASE WAS PREJUDICED BY KRAFT'S ERRORS, THUS SATISFYING *STRICKLAND*'S SECOND PRONG OF THE INEFFECTIVENESS TEST.

In the *Brief of Appellee*, the State[1] concedes, "…defense counsel was deficient in not hiring a handwriting analyst." *Brief of Appellee* at p. 28. However, the State attempts to argue Draper failed to establish Kraft was deficient in not challenging the foundation of Cory's testimony concerning Draper's handwriting, both as an expert and non-expert. *Id.* at pp. 20-22. The State further argues Draper was not prejudiced by Kraft's failure to hire a handwriting analyst because the evidence of Draper's guilt was compelling. *Id.* at p. 28. The State attempts to argue that Kraft "…made a legitimate strategic choice to use the identification [made by Cory of Draper's handwriting] to advance the defense." *Brief of Appellee* at p. 26. The State is mistaken in its assertion that Kraft's deficiency was not prejudicial on the outcome of this case, as established below.

[1] Terms not defined herein are afforded the meanings as defined in the *Brief of Appellant.*

As cited to in *Brief of Appellant* and which warrants further analysis herein, the Utah Supreme Court has stated the following concerning an attorney's responsibility to investigate:

> [C]ounsel has an important duty to "adequately investigate the underlying facts" of the case because investigation sets the foundation for counsel's strategic decisions about how to build the best defense. As explained by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

State v, Hales, 2007 UT 14, ¶69, 152 P.3d 321. Hales continues as follows:

> Under *Strickland*, even when counsel's performance is inadequate, a defendant who has been convicted of a crime is not entitled to a new trial unless the defendant establishes that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." "A reasonable probability is a probability sufficient to undermine confidence in the [jury verdict]." Because "[s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated trivial effect," in determining the effect of the error, we "consider the totality of the evidence before the ... jury."

Ibid. at ¶86. Draper has thus commenced the difficult task to demonstrate the prejudice he suffered due to Kraft's ineffectiveness at trial. "[I]t is exceedingly difficult to withdraw from the minds of jurors, or from any mind, suggestions of immaterial facts, insinuations of misleading rules of action, or arguments which arouse passion or prejudice[.]" London Guarantee & Acc. Co. v. Woelfle, 83 F.2d 325, 340 (8th Cir. 1936) *citing* Union Pac. R. Co. v. Field, 137 F. 14, 15 (8th Cir. 1905).

In a case dealing with false testimony given at trial, the court noted in a footnote that, "[i]t is, of course, not possible to predict precisely the impact of any item of information on a jury collectively or its members individually. This Court believes, however, that the impact of any given fact will vary, depending on how much other information the jury possesses." U.S. v. Nacrelli, 543 F.Supp. 798, 800 (D.C.Pa., 1982). The Utah Supreme Court has determined, "…this court has noted that pursuant to our 'inherent supervisory power over the courts,' we may presume prejudice in circumstances where it is 'unnecessary and ill-advised to pursue a case-by-case inquiry to weigh actual prejudice.'" State v. Arguelles, 921 P.2d 439, 442 (Utah,1996) *citing* Parsons v. Barnes, 871 P.2d 516, 523 n. 6 (Utah 1994) *quoting* State v. Brown, 853 P.2d 851, 857, 859 (Utah 1992).

In the instant matter, the State argues, "…Defendant's trial counsel made a legitimate strategic choice to use the identification to advance the defense." *Brief of Appellee* at p. 26. "Stated differently, Defendant's denial of unchallengable [sic] facts of his misdeeds not only exposed his consciousness of guilt, it unraveled his defense that he was not, at least, a party to the forgeries." *Id.* at p. 30. The State relies on speculative and unsupported statements in support of its argument that Draper has not satisfied *Strickland*'s second prong: "The only way to cover a theft of cash is to turn over a lesser amount of the cash than was collected from the client, along with a dummy invoice reflecting the lesser amount;" "[Defendant] obtained the cash that motivated the forgeries, and was so necessarily complicit in the scheme;" "Although counsel was not

specific, the reference is certainly to Hansen's testimony that Defendant insisted that he had collected only $122 from Goff." *Brief of Appellee* at pp. 32, 33, 34. However, these inferences take on a different connotation when considered with the testimony from the Remand Hearing.

Draper testified at the Remand Hearing that, at every meeting with Kraft, he inquired how the search for an expert was progressing. Supp. Tr. at pp. 66-67. To his detriment, Draper relied on Kraft's advice that he could not find one and that their defense was sufficient without one. *See*, Supp. Tr. at p. 74-75. The Findings credit Draper's testimony at the Remand Hearing that Draper and Kraft "did not mutually decide against hiring an expert and that counsel told Defendant that they would not have an expert because counsel could not find one." *See*, R0265. The trial court based this finding on two (2) factors, to wit: (1) that Cropp's meticulous records indicated no contact with Kraft during the relevant time period and (2) Draper "seemed more certain in his memory of events than did counsel." *Id.* While the trial court found this determination to only slightly balance in Draper's favor, it found Draper's memory of events to be more credible. R0266. Furthermore, "[Kraft] testified that he had always been able to find an expert…[Kraft] specifically stated that he had spoken with Ms. Cropp, a handwriting expert, regarding another case and could have consulted her in this case if necessary." R0265.

The trial court further found that it was Cropp's expert opinion that Draper was "probably not" the author of State's Exhibit 2, "most probably not" the author of State's

Exhibits 4 and 6, and that Cropp would have testified as such at trial. R0266-0267. The trial court additionally found that "it is possible another qualified expert would have reached a different conclusion from Ms. Cropp." R0266.

The facts set forth by the State do not contemplate the prejudice Draper suffered because an expert did not testified at trial. As further explored *post*, the facts relied upon by the State could also be construed as a young man who wished to avoid false charges, arrest, and imprisonment. The State further attempts to distract this Court from the prejudicial value of Kraft's ineffectiveness. Kraft had an important duty to adequately investigate the underlying facts of Draper's case because such investigation sets the foundation for Kraft's strategic decisions about how to build the best defense. Hales at ¶69. Kraft clearly did not investigate into locating and hiring Cropp during the pertinent time period, particularly in light of Cropp's meticulous records. *See*, R0265. Hence, Kraft could not have made a reasonable professional judgment not to pursue hiring an expert and, in failing to do so, failed to introduce at trial that Draper was "probably not" the author of State's Exhibit 2 and "most probably not" the author of State's Exhibits 4 and 6. R0266-0267. Such testimony would have been not only invaluable in Draper's defense but the absence thereof indicates the glaring prejudice suffered by Draper.

Had Cropp's testimony been introduced at trial, there is more than a reasonable probability that, absent Kraft's deficiencies, the jury would have had reasonable doubt respecting Draper's guilt. Hales at ¶86. Hence, Cropp's testimony alters the entire evidentiary picture. *Id.* However, demonstrating or measuring the prejudice suffered is a

difficult task. While Draper can demonstrate a reasonable probability the verdict would have been different had Cropp testified at trial, it is "not possible to predict precisely the impact of any item of information on a jury collectively or its members individually." Nacrelli at 800. Hence, while Draper contends Cory's testimony was the most damaging as it was the only testimony that pointed to the handwriting as Draper's, it is impossible to predict precisely the impact of Cory's testimony had on the jury, collectively or individually. *Id.* However, in view of the information available to the jury, it is highly probable that the jury relied on Cory's testimony that the handwriting was Draper's since no other opinion was presented. *Id.* Therefore, this Court should find Kraft's ineffectiveness prejudiced Draper in this matter, particularly since Kraft knew of Cropp, had used her services as a graphologist previously to Draper's case, and likely would have hired her again, had he not performed deficiently in this case.

II. DRAPER HAS ADEQUATELY MARSHALED THE EVIDENCE IN THIS CASE.

In its *Brief of Appellee* ,the State requests this Court to presume the sufficiency of evidence in this matter due to Draper's failure to marshal the evidence. *Brief of Appellee* at p. 36. However, the State ignores the adequate marshaling Draper demonstrated in *Brief of Appellant.* While the State's citation to caselaw concerning the marshaling requirement may be accurate, it is inapplicable to this matter. *See, Brief of Appellee* at pp. 36-37. Therefore, the State's request on this issue should be ignored.

The marshaling standard, "…requires appellants to marshal all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light

most favorable to the court below, the evidence is insufficient to support the findings." State v. Day, 815 P.2d 1345, 1351 (Utah App.,1991) *citing* State v. Moore, 802 P.2d 732, 738 (Utah App.1990) *quoting* Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985) (internal quotations omitted). Day continues as follows:

> The court must "view the evidence, along with the reasonable inferences from it, in the light most favorable to the verdict." *Id*. (*citing State v. Gardner* 789 P.2d 273, 285 (Utah 1989)). It is proper for us to reverse the jury's guilty verdict only if "the evidence and its inferences are so 'inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.' " *Id*. (*quoting State v. Petree*, 659 P.2d 443, 444 (Utah 1983)). It is the role of the jury to weigh the evidence and assess the credibility of the witnesses. "[S]o long as some evidence and reasonable inferences support the jury's findings, we will not disturb them." *Id*. (*citing State v. Booker*, 709 P.2d 342, 345 (Utah 1985)).

Id. In a case requiring marshaling of the evidence, the Utah Supreme Court determined, "[h]e has not acknowledged, let alone marshaled, the evidence presented at trial." State v. Hopkins, 1999 UT 98, ¶14, 989 P.2d 1065.

The *Brief of Appellant* cites to the following facts, which the State contends were not properly marshaled: Cory called Draper to inform him of discrepancies in Goff's invoice and asked Draper what happened. Tr. at p. 69. Cory testified that Draper's response was, "they were lying." Tr. at p. 70. Cory testified that Draper told him that State's Exhibit No. 2 reflected the correct charge of $122 and that was the figure he had charged Goff. Tr. at p. 71. Cory then met with Draper on July 18, 2005, with police officers. *Id.* Draper was arrested. Tr. at p. 72. Cory testified that, either later that day or the next day, Draper called him to say that Cory did not have to involve the police and

that he would have made it right. *Id.* The preceding facts are contained in *Brief of Appellant* at pp. 10-11. Therefore, the State is unable to point to a specific fact Draper omitted from *Brief of Appellant*. The State also attempts to construe the preceding facts as evidence of Draper's guilt. *Brief of Appellee* at pp. 36-39. However, in viewing these facts with Kraft's failures as Draper's counsel, such facts could also be construed as a scared and innocent young man who would have made this matter right to avoid arrest and imprisonment.

The State thus contends Draper has failed to meet the marshaling requirement and further argues the evidence was sufficient to convict Draper. *Brief of Appellee* at pp. 37-38. The State relies on two (2) facts to support its assertion: "[i]t is undisputed that the invoices Defendant submitted to his employer – State's Exhibits 2, 4, and 6 – bore signatures of the victims that were not genuine. It is also undisputed that the invoices retained by the victims – State's Exhibits 1, 3, and 5 – reflected their payment to Defendant of larger amounts of cash than was reflected on State's Exhibits 2, 4, and 6." *Brief of Appellee* at p. 38 (citations to the record omitted). The State misconstrues the *Brief of Appellant* by immediately ignoring the facts of this case and only focusing on those that distract from the ultimate issue. Draper's main contention on appeal involves Kraft's ineffectiveness as counsel at trial in this matter. Draper contends that Kraft was specifically ineffective for failing to object or require a proper foundation be laid for Cory's testimony concerning Draper's handwriting and Kraft's failure to hire a handwriting expert to testify at trial. Additionally, Draper argues on appeal that,

regardless of these failures, the verdict was still unsupported by the evidence due to the State's inability to definitively prove Draper was the guilty party, particularly since Matheny was incarcerated for similar charges.

Draper has properly marshaled the evidence. Draper has further demonstrated the evidence, even in a favorable light to the verdict, is insufficient to support it. Day at 1351. Draper properly acknowledged the evidence and its inferences that were favorable to the verdict; however, he has also demonstrated the evidence and its inferences are so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that Draper was guilty. Day at 1351 and Hopkins at ¶14.

It is noteworthy that, in response to *Brief of Appellant*, the State completely forsook the Remand Findings. The Remand Findings state, "Ms. Cropp testified that as to Exhibit 2, Defendant was 'probably not' the author and as to Exhibits 4 and 6, Defendant was 'most probably not' the author." R0266. The Remand Findings continue, "…Ms. Cropp testified that 'most probably not written by' was akin to over 90% certainty that Defendant was not the author. She further stated that 'probably not written by' equated to approximately 80% or higher certainty that Defendant was not the author of the invoices." R0266-0267. Not only has Draper properly marshaled the evidence in this matter, he has also demonstrated the insufficiency of the evidence to support the verdict.

III. THE STATE CANNOT NOW CHANGE ITS POSITION ON APPEAL.

In an attempt to defeat Draper's UT. R. EVID. 701 argument, the State argues in its *Brief of Appellee*, "[t]hus, contrary to Defendant's innuendo, the State did not call Cory

Hansen to give testimony as to his 'specialized knowledge' in detecting forgeries. Indeed, he never testified that any writing was a forgery." *Brief of Appellee* at p. 21. "Rather, he simply confirmed that, being familiar with Defendant's handwriting from their workplace, the *description of the work* on the invoices appeared to be in Defendant's handwriting." *Id.* However, as further explained *post*, the State cannot change their position on appeal for it was clearly its intention at trial that Cory testified the handwriting on the work orders was Draper's.

The Utah Supreme Court stated that, "[f]or an appellate court to permit a party who has tried his case in the lower court wholly or in part on a certain theory, which theory was acted on by the trial court, to change his position, and adopt another and different theory on appeal, would not be only unfair to the trial court, but manifestly unjust to the opposing litigant; especially when, as in the case at bar, respondent insisted on trying the case in the lower court on the theory now contended for in part by appellant, but which, in pursuance of objections made by her, was overruled by the court." Lebcher v. Lambert, 23 Utah 1, 63 P. 628 (Utah 1900). A party cannot change their theory of the case on appeal from that presented to the court below. *See*, 5 Am.Jur.2d, Appeal and Error § 546; Pettingill v. Perkins, 2 Utah.2d 266, 272 P.2d 185 (1954).

The purpose of Cory's testimony at trial was to testify the handwriting on the disputed invoices was Draper's. Cory testified that he was familiar with Draper's handwriting and identified the writing on State's Exhibits No. 2, 4, and 6 as Draper's. Tr. at p. 67. None of the other witnesses delivered testimony amounting to the elements

contained in the forgery charges. It was clearly the State's intention below that Cory testify that the handwriting contained in the work orders at issue was Draper's handwriting. If the State's stance on appeal is adopted, that Cory's testimony was only to give evidence about the work contained in the work order, then the State failed to present any evidence pertaining to the elements of the forgery charges, and Draper's sufficiency challenge is further supported. UT. R. APP. P. 24. It would be manifestly unjust to allow the State to change its theory of the case on appeal, particularly when Draper has relied upon the conviction for forgery to raise this matter on appeal and extensively challenge his counsel's ineffectiveness. Lebcher, *supra*. However, should this Court determine that the State's alternate theory is meritorious, then Draper's sufficiency challenge prevails in that no other evidence was presented as to the elements of that charge and it should thus be reversed.

IV. DRAPER IS NOT REQUIRED TO BRIEF EVERY ISSUE RAISED IN HIS DOCKETING STATEMENT OR F ROM REMAND.

In its *Brief of Appellee*, the State argues that, despite raising an issue pertaining to UT. R. EVID. 901 when remand was requested pursuant to UT. R. APP. P. 23B, Draper has failed to brief the issue in *Brief of Appellant* and any argument relating thereto should not be considered by this Court. *Brief of Appellee* at pp. 22-27. The State is correct that Draper did not raise the issue pertaining to UT. R. EVID. 901, but instead raised the same under UT. R. EVID. 701. Draper is not required to raise the issue similarly to that of either his docketing statement or his Rule 23B motion.

UT. R. APP. P. 23B allows for "…supplementation of the record, in limited circumstances, with nonspeculative facts not fully appearing in the record that *would* support the claimed deficient performance and the resulting prejudice." State v. Johnston, 2000 UT App. 290, ¶7, 13 P.3d 175 (emphasis added). UT. R. APP. P. 24 does not require that every issue raised in the docketing statement be briefed in the opening brief. Draper has concentrated on key issues on appeal that are most indicative of Kraft's prejudicial deficiencies and the errors below. Draper is interested in focusing this matter on the most significant and essential issues raised in *Brief of Appellant*.

The State avers, "[i]n fact, Defendant relied on rule 901 and related case law in moving this Court for a rule 23B remand. However, Defendant on appeal has substantially abandoned rule 901 as the legal basis for his claim that Mr. Kraft ineffectively failed to challenge Hansen's testimony." *Brief of Appellee* at p. 23 (internal citations to the record omitted). The State continues, "Defendant has failed to provide any meaningful analysis or relevant authority in support of his rule 901 argument, or a sufficient record in support of that argument. Accordingly, the Court should dismiss the claim as inadequately briefed and speculative." *Id* (internal citations to the record omitted).

Draper argued that, as a layperson, Cory would be unqualified to testify to the handwriting on the work orders as being Draper's. This is supported by Cropp's testimony that it would not be in the lay person's purview to be able to see through a forgery. Supp. Tr. at p. 54. Therefore, after the Remand Hearing, Draper determined to

only brief the issue pertaining to Cory as it relates to UT. R. EVID. 701. Draper reminds this Court that the purpose of UT. R. APP. P. 23B is to supplement the record on appeal with nonspeculative facts not fully appearing in the record that would support counsel's deficient performance and resulting prejudice. Johnston at ¶7. Hence, with the supplemented record this Court now has in this matter, *it would not be in the lay person's purview to be able to see through a forgery*. Supp. Tr. at p. 54. Therefore, Draper opted to brief this issue as it pertains to UT. R. EVID. 701, which was adequately preserved and briefed according to Utah law.

The *Brief of Appellant* is more than adequate for this Court's review. The brief substantially complies with UT. R. APP. P. 24 and includes the standard of review for each issue raised with supporting authority, sufficient statements of facts and the case, and legal analysis in support of the issues raised therein. Therefore, this Court should reach the merits of each issue raised and rule accordingly.

CONCLUSION

Wherefore, based upon the foregoing, Draper respectfully requests that this Court reverse the Verdict in this matter and take any such further action as this Court deems necessary.

DATED this 7th day of May, 2009.

_____

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CERTIFICATE OF MAILING

I hereby certify on this 7th day of May, 2009, I mailed, first class, postage prepaid, a true and correct of the foregoing *Reply Brief of Appellant* to:

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